Supreme Court, U. S.
FILED
MAY 9 1979
MICHAEL RODAK, JR., CLERK

No. 78-1411

In the Supreme Court of the United States

OCTOBER TERM, 1978

ADELA NANCY DEL VALLE AND MORRY S. FOX,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 587 F. 2d 699.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1979 and a petition for rehearing was denied on February 12, 1979. The petition for a writ of certiorari was filed on March 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether testimony that, in an attempt to conceal a conspiracy, one of the defendants attempted to suborn perjury before a grand jury should have been limited to that defendant.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners, James Davis, and others were convicted on 104 counts of mail fraud in violation of 18 U.S.C. 1341-1342 and one count of conspiracy in violation of 18 U.S.C. 371. Petitioner Fox was sentenced to concurrent terms of four years' imprisonment on each of the substantive offenses and to a consecutive term of four years on the conspiracy count. In addition, Fox was sentenced to pay a fine of $500 on each substantive count and a fine of $5,000 on the conspiracy count, for a total fine of $57,000. Petitioner Del Valle was sentenced to concurrent terms of 18 months' imprisonment on each of the substantive offenses and a consecutive term of eighteen months on the conspiracy count. In addition, she was sentenced to pay a fine of $50 on each substantive count and a fine of $2,500 on the conspiracy count, for a total fine of $7,700. The court of appeals affirmed.

1. The indictment charged a conspiracy and a scheme to defraud various insurance carriers, accident victims and the Florida Bar Association between January 1972 and the return of the indictment in August 1976 (Pet. App. 17a-106a) by defendant James Davis, a personal injury lawyer, petitioner Fox, a practicing physician, petitioner Del Valle, who was Fox's secretary, and their associates. Following passage of the 1972 Florida no-fault law which limited auto accident personal injury law suits to cases involving medical bills in excess of $1,000 (I Tr. 122-124), defendant Davis, petitioner Fox, who treated patients referred to him by Davis, and petitioner Del Valle submitted false and inflated medical bills which exceeded the $1,000 limit to insurance companies (II Tr. 283) and induced them to pay over 45 drafts

totalling over $75,000. Each draft, except four, was made payable to one of the following: to Davis, his law firm, petitioner Fox, or Westchester Hospital (owned by petitioner Fox). In some instances, the accidents and medical expenses for which claims were submitted by Davis and bills were furnished by Fox (through Del Valle) were purely fictional (II Tr. 239, 245-246, 291-292). In other cases, petitioner Fox billed the insurance companies for 10 to 20 times the number of office visits the accident victims actually made (see, *e.g.*, II Tr. 392, 397, 399, 402, 403). Altogether, twenty-three witnesses testified that they never made the number of office visits for which the insurance companies were billed. Fox received regular cash payments for his part in the scheme—on one occasion as much as $10,000 in cash (II Tr. 300-301).

Petitioner Del Valle, on her part, regularly cooperated with co-defendant Mary Hamilton's (Davis' secretary) requests for higher bills by preparing inflated bills (II Tr. 286-289; I Tr. 175).

The evidence also showed that the scheme was subject to several investigations throughout its existence. A representative from the local transit authority met with Davis several times in 1973 to discuss the large number of bus accidents Davis was handling. He was particularly interested in 30 of the cases Davis handled and petitioner Fox treated where there was no proof that the victim had been on the bus involved in the accident (II Tr. 238-247). Upon learning of this investigation Davis instructed his employees to contact all the clients and tell them what to say to investigators (II Tr. 310-311; IV Tr. 759).

In the spring of 1974 the Florida Bar Association instigated its own investigation into the practices of

Davis and Fox after receiving a complaint from a former client of Davis (II Tr. 311-312; V Tr. 1005-1008). To explain the expenses of the complainant's case, Davis obtained a false bill for "conferences" from petitioner Fox and sent back a letter to the Bar listing the expenses (II Tr. 312; V Tr. 1008-1009). The former complainant's files, seized during a search of petitioner Fox's office, contained a copy of the "conference" bills together with two hand written notes, one referring to "Mr. Gross-Florida Bar Assn."

As part of the government's case, Mary Hamilton, Davis' secretary, also testified that in May 1976 she was subpoened to testify before the grand jury that returned the indictment and that, before her appearance, Davis instructed her to lie and to construct a false explanation for the office's request for specific medical bills from Fox and for the cashed drafts from insurance companies (II Tr. 315-319). She also said that Davis paid Preston Wellons, a client, after he was contacted by federal investigators (II Tr. 315). Wellons, for his part, testified that Davis loaned him 50 dollars and secured the services of an attorney for him after he received a subpoena (III Tr. 557-562). Harold Duke, another client, testified that before his grand jury appearance co-defendant Irving Curtis, a "runner" for Davis, asked him to talk to Davis before he appeared because "he is going to put a little something in your hand or just a little something in your pocket" (IV Tr. 921-922).

In admitting this testimony over petitioners' objection that it was hearsay and involved an activity occurring subsequent to the conspiracy charged (II Tr. 266-272; III Tr. 559; IV Tr. 917-920), the court gave a limiting instruction to the jury that it could consider such evidence against a defendant not present only if it

found that there was a conspiracy, that such defendant became a member of such conspiracy and that the acts and statements related in the testimony occurred "during the continunce of the common plan or arrangement and in furtherance of some intended object or purpose of the common plan" or arrangement (II Tr. 306-310).

ARGUMENT

Petitioners argue that their convictions should be overturned because the trial court refused to restrict testimony about attempts to suborn perjury before the federal grand jury to co-defendants Davis and Curtis, the persons who made such efforts. Petitioners, who were not mentioned in this testimony, contend that "*Krulewitch* v. *United States*, 336 U.S. 440 (1948), and *Grunewald* v. *United States*, 353 U.S. 391 (1957), specifically limit the admissibility of hearsay declarations by co-conspirators to cases where the declarations were clearly made during the existence of the conspiracy *and* in furtherance of the conspiracy's main . . . object or objects" and that the court below misapplied those cases and Rule 801(d)(2)(E) of the Federal Rules of Evidence (Pet. 11).

The court below examined the record and rejected petitioner's contentions (Pet. App. 9a):

> There are obvious distinctions between the conspiracy here and the one to which the *Krulewitch* holding was applied. The first distinction involves the sequence of events. We are dealing with statements made not after but during the conspiracy's operation. Second, the conspiracy here was not aimed at accomplishing a single objective with a precise moment of termination. This conspiracy had a continuing sequence of objectives. Third, the role of Davis in the conspiracy necessitated that he protect it from

> those investigative agencies which threatened its continuation. He was its shield. His attempts to influence witnesses were not acts of concealment related only to a past objective. They were parts of continuing activity that was essential to and therefore in furtherance of the survival of an ongoing operation. As this court recognized in *United States* v. *Diez, supra,* concealment is sometimes a necessary part of a conspiracy, so that statements made solely to aid the concealment are in fact made during and in furtherance of the charged conspiracy.

We submit that this essentially factual conclusion should not be disturbed.

The evidence fully supports the view that Davis' activities were part of a series of continuing efforts to conceal the conspiracy, including his previous cover-up attempts during the investigations by the local transit association and by the bar association. Significantly, during the investigation by the bar association, petitioner Fox through petitioner Del Valle aided the efforts to conceal by submitting a false bill to the investigators. See *Grunewald, supra,* 353 U.S. at 405; *United States* v. *Mackey,* 571 F. 2d 376, 382-384 (7th Cir. 1978); *United States* v. *Portner,* 462 F. 2d 678 (2d Cir.), cert. denied, 409 U.S. 983 (1972); *United States* v. *Bigos,* 459 F. 2d 639 (1st Cir.), cert. denied, 409 U.S. 847 (1972). Nor was the conspiracy otherwise ended when Davis was attempting to suborn perjury before the grand jury. The

record shows that clients were still being solicited for the insurance fraud scheme in August 1976.[1]

At all events, petitioners are most unlikely to have suffered any prejudice. They were not mentioned in the disputed testimony and the exhibits produced at trial showed that petitioners Fox and Del Valle inflated medical bills on at least twenty-five separate occasions. In addition, the trial court protected petitioners' rights by giving the cautionary instruction, immediately after the objected-to declarations, that the jury must first conclude on the basis of independent evidence that petitioners were members of the conspiracy before considering co-conspirator declarations (II Tr. 308-309, 316). This instruction was repeated in the closing charge, which told the jury that it must conclude that the independent evidence showed beyond a reasonable

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[1]Petitioners claim the court of appeals incorrectly interpreted the following testimony of witness Hamilton (II Tr. 303):

> Q. Miss Hamilton, you have described the procedures that have been used in the office, concerning the bringing in of cases, the receipt of bills from Dr. Fox's office.
>
> Now, when you left in August of 1976, was that procedure still being followed?
>
> A. Yes, it was.

The procedure concerning "the bringing in of cases" refers to Hamilton's prior testimony that co-defendant Curtis and others were paid for soliciting cases for the insurance fraud scheme (II Tr. 294-297). The "receipt of bills from Dr. Fox's office" refers to Hamilton's testimony that Davis routinely requested bills of specified amounts from petitioner Fox in order to meet the required threshhold amount (II Tr. 286-287, 289-290). Thus, there had been no change in the procedure for the solicitation of clients and the inflation of claims submitted to the insurance companies at the time Hamilton left in August 1976, the same month the indictment was returned.

doubt that petitioners were members of the conspiracy before considering co-conspirator declarations (IX Tr. 2112-2113). In these circumstances, even if the testimony concerning the effort to influence the grand jury witnesses should have been restricted to Davis and Curtis, the error was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979

DOJ-1979-05